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ATTORNEY-CLIENT PRIVILEGED ADVICE

Mr. Brad Biladeau
Associate Executive for Government Relations
Michigan Association of School Administrators
1001 Centennial Way, Suite 300
Lansing, MI 48917

Re: Constitutional Analysis of SB 620 Regarding Conversion Schools

Dear Mr. Biladeau:

You have requested our opinion as to the constitutionality of Michigan Senate Bill 620 ("SB 620"), which would allow a public school identified among the lowest achieving 5% in the State to be converted to a conversion school ("Conversion School") by petition of (i) 60% of eligible parents and legal guardians of pupils enrolled in the school or (ii) 51% of such eligible parents and legal guardians and 60% of the teachers working full time at the school.

The question specifically addressed in this opinion is whether the proposed grant to parents and legal guardians, or parents, legal guardians and teachers, of a right to petition is constitutionally sound. We conclude that the power conferred by the bill, if enacted into law, would violate the equal protection clause under the Fourteenth Amendment to the U.S. Constitution by unnecessarily granting a dispositive voice on school restructuring to a limited group of individuals and denying that voice to others who reside within the school's jurisdiction and who are otherwise qualified to participate in electoral and petition processes.

Summary of Proposed Legislation Authorizing Conversion Schools

SB 620 proposes to amend the Revised School Code, Act 451, Public Acts of Michigan, 1976, as amended (the "Code") to establish Conversion Schools. A Conversion School would be

authorized and organized by contract with an authorizing body, similar to public school academies ("PSAs" or "Charter Schools").[1]

- Unlike PSAs, Conversion Schools would not be entirely new creations but would result from the conversion of certain existing public schools.[2]

- Only those public schools which have been identified by the Michigan Department of Education (the "MDE") as among the lowest achieving 5% of public schools in the State would be eligible for conversion.

- Further, and pertinent to this opinion, the conversion of an eligible low achieving school to a Conversion School would occur only upon the submission to the MDE of a petition requesting a conversion (a "Parental Petition"), as follows:

    - Within 7 days after a public school is placed under the supervision of the State school reform/redesign officer under the Code (i.e., that has been identified within the lowest achieving 5% of public schools.), the school board or governing body of the district operating the school is required to issue a written notification to the parent or legal guardian of each pupil enrolled in the school, and is required to post a notification on its website homepage, explaining that the school has been placed under the State school reform/redesign officer due to pupil performance, and that the school board will work with the State school reform/redesign officer to adopt and implement a school intervention model and redesign plan for the school, in accordance with the Code and federal law[3] unless a valid petition is submitted to the MDE by the parents of the pupils at the school recommending a school intervention model.

    - A Parental Petition may be submitted within 90 days after the public school is placed under the supervision of a State school reform/redesign officer recommending a single school intervention model to be implemented for the

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[1] Any of the following may act as an authorizing body for a Conversion School: a school district board, an intermediate school district board, the board of a community college, the governing board of a state university or any two or more of the above entities acting pursuant to an interlocal agreement under Act 7, Public Acts of Michigan, 1967, as amended.

[2] Under SB 620, a Conversion School may or may not use the existing school building. If the Conversion School intends to use the existing building, the school district that owns the building would be required to lease the building to the Conversion School for $1.00 per year for as long as the Conversion School uses the building for classroom instruction or for a shorter term at the option of the Conversion School.

[3] School intervention models and redesign plans are the turnaround model, restart model, school closure model and transformation model, all as provided for in Section 1280c(2) of the Code and pursuant to Sections 14005 and 14006 of Title XIV of the American Recovery and Reinvestment Act of 2009, Public Law 111-5, known as the "race to the top" program.

school. The MDE then has 30 days to determine if the Parental Petition is valid and certify the Parental Petition.

- A Parental Petition must contain the valid signatures of at least 60% of the eligible parents or legal guardians, or at least 51% of the eligible parents or legal guardians of the school and at least 60% of the teachers employed and working full time at the school at the time the Parental Petition is submitted.

- The eligible parents and legal guardians for the school may create a parental advisory committee to work with the school board and with the State school reform/redesign officer to implement the school intervention model and redesign plan.

- Under SB 620, "eligible parent or legal guardian" means the parent or legal guardian of a pupil enrolled in the public school that is subject of the Parental Petition if the pupil is enrolled in the school on the first day of the applicable school year, or becomes enrolled in the school after the first day of the school year but before the Parental Petition is submitted, and the pupil remains enrolled at the school when the Parental Petition is submitted. The bill does not require eligible parents or legal guardians to be residents or registered voters in the school district of which the public school is a part, or even citizens of the United States.

SB 620, therefore, grants to parents and legal guardians of pupils, or parents, legal guardians and teachers, in a school eligible for conversion the power to determine the course of intervention and redesign for that school, with an alternative for a combined parent-teacher petition effort. SB 620 does not grant the same power to other interested members of the school community, including the electorate.

U.S. Constitution Equal Protection Clause ("EPC")

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.* (Emphasis added.)

Analysis of EPC Applied to SB 620 Petition Procedure

SB 620 proposes to grant a voice on school restructuring to some individuals who may or may not be residents or voters in the school's jurisdiction (i.e., parents and legal guardians, and potentially teachers) while denying that voice to others who reside within the school's jurisdiction and who are otherwise qualified to participate in electoral and petition processes with respect to school district matters. This legislation, if enacted, would dilute the effectiveness of

some, or even all, resident and electorate votes with respect to the control and operation of the school, in violation of the EPC. All qualified and registered voters within the school district of which the public school at issue is a part have equal access to vote for local and State officials charged with school governance. While some tasks are then legally delegated by elected officials to appointed persons, compliance with the EPC is maintained because all qualified and registered voters within the school district have been given an *equal opportunity* to cast votes for those with responsibility for school governance at the State and local level. Under SB 620, however, once a school is identified as among the lowest achieving 5%, a limited group of self-selected individuals who may or may not be residents or registered voters in the school district's jurisdiction suddenly have a chance to influence and determine the direction and form of governance for that school.

Courts have consistently held that state statutes that dilute the effectiveness of some citizens' votes, or that deny the franchise to citizens who are otherwise qualified by residence and age, will receive close scrutiny, and will only be upheld if the distinctions are necessary to promote a compelling state interest. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Avery v. Midland County*, 390 U.S. 474 (1968); *Kramer v. Union Free School District*, 395 U.S. 621 (1969); *Township of Casco v. Secretary of State*, 472 Mich. 566 (2005).[4] Courts have found EPC violations where some citizens have been denied "any effective voice in the governmental affairs which substantially affect their lives." *Kramer*, 395 U.S. at 627. An EPC violation would, therefore, exist in the present situation where some citizens within a school district who are otherwise qualified to exercise voting rights and lawful referendum rights on school affairs would suddenly be denied a voice on those affairs through a petition process that would, nonetheless, be granted to others who are self-selected, and who may or may not be citizens or registered voters within the school district's jurisdiction.

The U.S. Supreme Court has distinguished valid EPC claims from claims of disenfranchisement with respect to laws denying a vote on certain matters to <u>all</u> otherwise qualified voters, for example where a state law provides for the *appointment* of certain officals. As the Court has stated, "the effectiveness of any citizen's voice in governmental affairs can be determined only in relationship to the power of other citizens' votes. For example, if school board members are appointed by the mayor, the district residents may effect a change in the board's membership or policies through their votes for the mayor. Each resident's influence is perhaps indirect, but it is *equal* to that of other residents. However, when the school board positions are filled by election and *some otherwise qualified city electors are precluded from voting*, the excluded residents, when compared to the franchised residents, no longer have an effective voice in school affairs." *Kramer*, 395 U.S. at 627 (emphasis added).

[4] Courts have found only two exceptions to the one-person, one-vote close scrutiny standard under the EPC, and applied a more lenient rational basis as follows: first with respect to "special purpose districts", such as water storage districts which perform functions that "so disproportionately affect different groups" and for changes to municipal boundaries. *Township of Casco*, 472 Mich. at 612-613 (citing *Sayler Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973); *Hunter v. Pittsburgh*, 207 U.S. 161 (1907).

By analogy, where any Michigan school district that is identified as among the lowest achieving 5% is placed under a State school reform/redesign officer, all qualified voters within that school's jurisdiction maintain an equal voice in school affairs, notwithstanding the reform/redesign intervention implemented pursuant to state law. On the other hand, where a sub-group of self-selected parents and guardians, and potentially teachers, who may or may not be qualified voters within the school district's jurisdiction, are allowed a voice to petition for a reform/redesign model (i.e., vote to express a particular point of view) and that voice is denied to others who otherwise have equal access to determine governmental and school affairs, the disenfranchised citizens are denied equal protection of the laws.

The question then is whether the exclusion of non-parents (or non-teachers in the second scenario) from the right to petition and influence school reform under SB 620 is necessary to promote a compelling state interest. In *Kramer*, the U.S. Supreme Court found an EPC violation where "qualified school district voters" was defined by New York statute to include only those residents with children enrolled in the district or who owned or leased property located in the district, even though the school board was chosen at an annual meeting of such qualified voters and not at a regular election. Among those prohibited from voting was the individual who initiated the suit, a qualified, registered voter with no children, residing in the district at his parents' home and therefore not owning or leasing property. The Court emphasized that the statute disenfranchised people who, similarly, lived in their parents' home with no school-aged children, as well as senior citizens and others living with children or relatives; clergy, military personnel, and others who live on tax-exempt property; boarders and lodgers; parents who neither own nor lease qualifying property and whose children are too young to attend school and parents who neither own nor lease qualifying property and whose children attend private school. *Kramer*, 395 U.S. at 630. *See also Township of Casco*, 472 Mich. at 612 (citing *Kramer* for invalidating a New York law that restricted voting in school district elections to owners and lessees of taxable property within the school district and to parents of children attending the schools.).

Applying close scrutiny, the *Kramer* Court held that the state had no compelling interest to necessitate limiting the vote to those with children in the district or who owned or leased property within the district. The Court found that a state argument that the restrictions were intended to grant the voting power only to those "primarily interested" in school matters, whether as parents or district taxpayers, did not justify denying the franchise to other qualified resident voters, and further did not sufficiently tailor the exclusion to meet the stated goal of reaching only those primarily interested in school matters. The Court explained that the statute permitted "inclusion of many persons who have, at best, a remote and indirect interest, in school affairs and, on the other hand, exclude[d] others who have a distinct and direct interest in school meeting decisions." As the individual who initiated the suit successfully argued, "[a]ll members of the community have an interest in the quality and structure of public education...and the decisions taken by local [school] boards may have grave consequences to the entire population." *Id.* at 630-632.

SB 620's provision granting a voice on school governance and operations to only a limited group of qualified and registered voters within a school's jurisdiction, who may or may not have individual interests in school reform matters, while denying that voice to other qualified and registered voters who may have an interest in educational matters which can affect the quality of life in their community, similarly violates the legitimate right of some otherwise qualified people to have a voice in their local public education system. Indeed, SB 620's Parental Petition process is more limiting than the New York law discussed above for it restricts the right to have such voice to parents and legal guardians only and unconstitutionally denies the right even to those residents paying taxes to benefit the schools within their district. Under *Reynolds, Avery, Kramer* and their progeny, no compelling state interest exists to necessitate such exclusionary measures with respect to public education in Michigan.

Conclusion

SB 620 would allow a public school identified among the lowest achieving 5% in the State to be converted to a Conversion School by petition of 60% of eligible parents and legal guardians of pupils enrolled in the school, or at least 51% of the eligible parents or legal guardians and at least 60% of the eligible teachers, of the school. SB 620, therefore, grants to parents and legal guardians of pupils in a school eligible for conversion the power to determine the course of intervention and redesign for that school, with an alternative for a combined parent-teacher petition effort. Eligible parents and teachers are not required to be residents or registered voters in the affected school district, giving such parents and teachers rights greater than the rights of other interested members, including qualified voters, of the school community.

The U.S. Supreme Court struck down a New York law that limited school elections to qualified and registered voters with children in the district or who owned or leased property within the district. The Court found that a state argument that the restrictions were intended to grant the voting power only to those "primarily interested" in school matters, whether as parents or district taxpayers, did not justify denying the franchise to other qualified resident voters, and further did not sufficiently tailor the exclusion to meet the stated goal of reaching only those primarily interested in school matters. SB 620's provision granting a voice on school governance and operations to only a limited group of qualified and registered voters within a school's jurisdiction, who may or may not have individual interests in school reform matters, while denying that voice to other qualified and registered voters who may have an interest in educational matters which can affect the quality of life in their community, is more limiting than the New York law discussed above for it restricts the right to have such voice to parents and legal guardians only and unconstitutionally denies the right even to those residents paying taxes to benefit the schools within their district.

SB 620's limitation, if enacted into law, would violate the equal protection clause under the Fourteenth Amendment to the U.S. Constitution by unnecessarily granting a voice on school restructuring to some self-selected individuals who may or may not be residents or registered voters in the school's jurisdiction, and denying that voice to others who reside within the school's jurisdiction and who are otherwise qualified to participate in electoral and petition processes.

Very truly yours,

Miller, Canfield, Paddock and Stone, P.L.C.

By: Amanda Van Dusen

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